PD-0984-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/10/2020 1:50 PM
Accepted 1/10/2020 1:52 PM
DEANA WILLIAMSON
CLERK

No. PD-0984-19

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
1/10/2020
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS , Appellant

v.

SEAN MICHAEL MCGUIRE, Appellee

Appeal from Fort Bend County
No. 01-18-00146-CR

* * * * *

# STATE'S BRIEF ON THE MERITS

* * * * *

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## IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Sean Michael McGuire.

* The trial judges were the Honorable Pedro P. Ruiz, 240th Judicial District, Honorable Brady G. Elliott, 268th Judicial District, Honorable Don Higgenbothem, 240th Judicial District, and Honorable Thomas R. Culver, III, 240th District Court.

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* Counsel for Appellee on appeal is Kristen Elaine Jernigan, 207 S. Austin Avenue, Georgetown, Texas 78626.

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No. PD-0984-19

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

THE STATE OF TEXAS , Appellant

v.

SEAN MICHAEL MCGUIRE, Appellee

Appeal from Fort Bend County
No. 01-18-00146-CR

* * * * *

**STATE'S BRIEF ON THE MERITS**

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

According to the plain text of TEX. CODE CRIM. PROC. art. 14.03(a)(1), exigent circumstances were not required to justify the warrantless arrest of Appellee who was found in a suspicious public place under circumstances that reasonably showed he committed DWI, intoxication manslaughter, and failure to stop and render aid. Alternatively, if Article 14.03(a)(1) has a global exigency element, it was satisfied

here.

## STATEMENT REGARDING ORAL ARGUMENT

The State did not request oral argument, but Appellee did request argument in his response.[1] The Court did not grant argument.

## STATEMENT OF THE CASE

Appellee was charged with felony murder. 1 CR on Remand Corrected[2] 5-6. He filed a motion to suppress challenging his warrantless arrest. 1 CR on Remand Corrected 11-15. The trial court granted the motion. 1 CR on Remand Corrected 71-78. The First Court of Appeals majority affirmed, holding that Article 14.03(a)(1) has an exigency requirement and that the State failed to meet its burden on the issue.[3] *State v. McGuire*,__S.W.3d__, No. 01-18-00146-CR, 2019 WL 4065459, at *5-9 (Tex. App.—Houston [1st Dist.] 2019).

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[1] Appellee's Response to State's Petition for Discretionary Review, filed October 8, 2019, at v.

[2] Because this case has prior appellate history, the SPA refers to the second suppression record following the court of appeals' remand after vacating the trial court's judgment as Corrected CR.

[3] Justice Keyes dissented in part to this particular holding. *Id*. at *13 (Keyes, J., dissenting). She stated that Article 14.03(a)(1) does not require exigency in all situations; nevertheless, she concluded that it plays a "prominent role" in the totality of the circumstances analysis. *Id*.

## STATEMENT OF PROCEDURAL HISTORY

A majority of the court of appeals affirmed the trial court's ruling granting Appellee's motion to suppress. *Id*.

## ISSUES PRESENTED

1. **Does TEX. CODE CRIM. PROC. art. 14.03(a)(1) have an exigency requirement for warrantless arrests?**

2. **If Article 14.03(a)(1) has an exigency requirement for a warrantless arrest in public, it was satisfied here because the integrity of blood-alcohol-content evidence would have been compromised had Appellee been free to leave.**

## SUMMARY OF THE ARGUMENT

Article 14.03(a)(1) does not contain an exigency element. That the Legislature has expressly provided for exigency elsewhere in Chapter 14 is conclusive evidence of its intentional omission from Article 14.03(a)(1). The plain text is consistent with the U.S. and Texas Constitutions, which do not require a warrant for a public arrest based on probable cause. Adhering to the express intent of the Legislature is not absurd, while judicial insertion of an exigency element will create circumstances ripe for absurdity. Further, important to *stare decisis*, this Court has never held that Article 14.03(a)(1) has a general exigency requirement. Therefore, cases that have implied the opposite should be disavowed as contrary to the plain text of Article 14.03(a)(1) and constitutional law.

Alternatively, exigency was satisfied here. The bare possibility of obtaining a warrant within approximately two hours—which includes the investigation time and anticipated warrant procurement time—would have negatively impacted the value of any blood alcohol content (BAC) sample. Further, any opportunity for Appellee to ingest any additional faculty-altering substance would have undermined any BAC test result. Arresting Appellee was thus necessary to preserve the integrity of Appellee's BAC. And a warrantless public arrest, unlike a warrantless blood draw, did not violate Appellee's constitutional rights. It is also significant that Appellee was suspected of committing the serious offense of intoxication manslaughter, and the troopers' hectic preliminary investigation into the fatality leading up to probable cause for Appellee's arrest monopolized their attention for twenty minutes.[4] Finally, if not arrested, Appellee would not have been obligated to remain at the scene indefinitely. Executing a warrant later would, in addition to compromising any BAC evidence, needlessly consume already scarce resources and pose additional (but avoidable) safety risks to officers and bystanders.

[4] The SPA indicated that the time between the dispatch and Appellee's arrest was approximately forty-five minutes in her PDR based on the reporter's record. However, after reviewing the video of the arrest, the evidence shows it was twenty minutes. State's Suppression Exhibit 1 (Wiles' in-car video at 3:20).

## FACTS

In August 2010, around 12:41 a.m., Troopers Filmore, Tomlin, and Wiles were dispatched to the scene of a fatal accident involving Appellee's truck and victim-motorcyclist David Stidman. 2 Supp. RR 15-19, 33, 51, 54, 142, 145. Appellee had driven about a tenth of a mile from the accident scene to a Shell station in his damaged truck, 2 Supp. RR 17-21, 42, 145, 166, and reported the accident by calling two local police officers whom he personally knew. 2 Supp. RR 22, 27, 37-38, 183-84. When Trooper Tomlin questioned Appellee about the accident at the Shell station, Appellee said his wife told him he hit a person; his wife confirmed the exchange and further explained that "a person had walked in front of" them and they had not stopped because they "didn't know what to do." 2 Supp. RR 66, 68, 90, 202; 5 RR 78. Appellee's alcohol-laden breath, blood-shot eyes, and swaying stance led the troopers to believe he was intoxicated. 2 Supp. RR 22-24, 93-94, 147-48, 151; 5 RR 80. Appellee was placed in the passenger's seat of Trooper Wiles' car so he could be returned to the accident scene. 2 Supp. RR 21-23, 54, 113. Appellee's mother drove his truck back to the scene. 2 Supp. RR 26. After looking at the wrecked motorcycle, Appellee became outwardly emotional. 2 Supp. RR 56-58, 97-99, 114. Concluding that Appellee drove while intoxicated, committed intoxication manslaughter, and failed to stop and render aid, Wiles handcuffed and *Mirandized*

Appellee at 1:01 a.m. 2 Supp. RR 56-58, 97-99, 114, 152-53, 190-92; State's Suppression Ex. 1 (Wiles' in-car video at 3:20). About a half hour later, Filmore took Appellee to the hospital to have his blood drawn[5] and then to the jail. 6 RR 54-55; State's Suppression Ex. 1 (Wiles' in-car video). Appellee's truck was released to his mother and not impounded. 2 Supp. RR 30, 71, 192.

## ARGUMENT

### I. TEX. CODE CRIM. PROC. art. 14.03(a)(1).

TEX. CODE CRIM. PROC. art. 14.03 states, in part:

> (a) Any peace officer may arrest, without warrant:
>
> (1) persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony, violation of Title 9, Chapter 42, Penal Code, breach of the peace, or offense under Section 49.02, Penal Code, or threaten, or are about to commit some offense against the laws; . . . .[6]

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[5] The evidence obtained as a result of the blood draw was suppressed in the wake of *Missouri v. McNeely*, 569 U.S. 141 (2013). *McGuire v. State*, 493 S.W.3d 177, 197-98 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd).

[6] This Court has held that arrest in TEX. CODE CRIM. PROC. art. 14.03(g) includes temporary investigative detentions. *State v. Kurtz*, 152 S.W.3d 72, 79-80 (Tex. Crim. App. 2004).

## II. TEX. CODE CRIM. PROC. art. 14.03(a)(1) has no blanket exigency requirement.

### 1. The plain text: the Legislature knows how to require exigent circumstances, and it made no global requirement in Article 14.03(a)(1).

Decades of legislative history concerning Chapter 14 of the Code of Criminal Procedure shows that global exigency was intentionally excluded from Article 14.03(a).

When the Code was reenacted and revised in 1965, Article 14.03 granted municipalities the authority to make rules authorizing "the arrest, without a warrant, of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws."[7] The latter circumstances typify the meaning of exigency. Therefore, Article 14.03 incorporated the concept of exigency. But it was in a fashion limited to preventing reasonably foreseeable crime.

At that time, the next provision, TEX. CODE CRIM. PROC. art. 14.04, required exigency but did so expressly. It authorized a warrantless arrest of a felon about to

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[7] Acts 1965, 59th Leg. R.S., ch. 722 (S.B. 107), § 1, p. 362, eff. Jan. 1, 1966. This text was carried over from Article 211 of the 1856 Code of Criminal Procedure. https://lrl.texas.gov/scanned/statutes_and_codes/code_of_criminal_procedure.pdf.

escape such "that there is no time to procure a warrant[.]"[8] *See Miles v. State*, 241 S.W.3d 28, 42 (Tex. Crim. App. 2007) (Article 14.04 requires the exigency of escape). This provision remains exactly the same today.

The next meeting of the Legislature in 1967 brought about a significant change to Article 14.03.[9] It became a general law and municipalities no longer had the authority to enact "suspicious[-]places"-arrest rules.[10] Exigency was still relevant to the warrantless arrest of persons on the verge of committing an offense.[11]

Seven years later, in 1981, another exigency-inclusive provision was enacted by way of subsection (b) to Article 14.03. TEX. CODE CRIM. PROC. art. 14.03(b) focused entirely on assault causing bodily injury and was manifestly intended to prevent further injury.[12] It authorized an arrest when there was probable cause to believe (1) a bodily injury assault occurred, and (2) there is an "immediate danger"

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[8] *Id*.

[9] Acts 1967, 60th Leg. R.S., ch. 659 (S.B. 145), § 9, p. 1735, eff. Aug. 28, 1967.

[10] *Id*.

[11] *Id*.

[12] Acts 1981, 67th Leg. R.S., ch. 442 (H.B. 1743), § 1, p. 1865, eff. Aug. 31, 1981.

of further bodily injury.[13] Four years later, the Legislature removed "immediate" as a modifier to the "danger" element.[14]

Another subsequent provision was amended to create an exigency element in 1987. TEX. CODE CRIM. PROC. art. 14.05 was amended to prohibit an officer from making a warrantless arrest inside a residence unless "exigent circumstances" require entry without consent or a warrant.[15]

The plain text of Article 14.03(a)(1), now fifty-five years after the drastic 1965 overhaul, contains no exigency element for suspicious places arrests involving persons guilty of a felony, a violation of Penal Code Title 9, Chapter 42, breach of the peace, or an offense under TEX. PENAL CODE § 49.02. And the textual history of Articles 14.03, 14.04, 14.05 embracing exigency as a condition prove that it was purposefully excluded. To insert exigency with a judicial wand, as the court of appeals did, goes against the will of the Legislature and amounts to a separation-of-powers violation. *See Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (courts cannot add to or subtract from a statute's text).

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[13] *Id*.

[14] Acts 1985, 69th Leg., ch. 583 (S.B. 869), § 3, p. 2203, eff. Sept. 1, 1985.

[15] Acts 1987, 70th Leg., ch. 532 (H.B. 1175), § 1, pp. 2150-51, eff. Aug. 31, 1987.

This should settle the matter. When the text is plain, that is both the beginning and the end of the analysis. *Id*. at 785-86. But the issue has been clouded by specious *dicta* first introduced more than fifteen years ago.

**2. A lot of explaining is needed to clear up any perceived murkiness developed in *Gallups* and *Swain*.**

**A. Sowing the seed in *Dyar v. State*.**

The court of appeals relied on *Gallups v. State*[16] and *Swain v. State*[17] in holding that exigency is an element in Article 14.03(a)(1). But any perceived global exigency element in those cases began with a faulty seed planted by Judge Cochran in her concurring opinion in *Dyar v. State*. 125 S.W.3d 460, 468-71 (Tex. Crim. App. 2003) (Cochran, J., concurring). In it, Judge Cochran urged the Legislature to revise the "troublesome" Article 14.03(a)(1). *Id*. at 469. The clause "persons found in suspicious places," she lamented, "has engendered . . . convoluted constructions" and caused courts to engage in "impressive judicial gymnastics" to discern legislative intent. *Id*. Keying in on a single exigency element—authorizing the arrest of persons "about to commit some offense"—Judge Cochran opined: "drunks in the bar were subject to warrantless arrest even though they had not yet breached the peace,

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[16] 151 S.W.3d 196 (Tex. Crim. App. 2004).

[17] 181 S.W.3d 359 (Tex. Crim. App. 2005).

prostitutes could be arrested as they plied their trade, and those who acted like they were about to burglarize a store or home could be arrested before any crime occurred." *Id*. Previously permissible "investigatory detentions and arrests" "in suspicious places" would be "constitutionally offensive" today. *Id*. To give the modern version of the pre-Civil War provision legitimacy, she proposed justifying the Court's prior decisions under the "organizational principle of exigent circumstances." *Id*. at 470. She elaborated:

> when police have probable cause to believe that person 'X' has committed a felony or breach of the peace and he is found in 'Y' location under 'suspicious circumstances' and there is no time to obtain a warrant because: 1) the person will not otherwise remain at 'Y' location; 2) the evidence of the crime will otherwise disappear; or 3) the person poses a continuing present threat to others, then police may arrest 'X' without a warrant.

*Id*. at 471.

Judge Cochran's exigency idea was not new. She adopted Professor Reamey's proposal. He argued:

> Necessity is the guiding principle in interpreting warrant exceptions . . . . The correct question in crime scene cases is not whether an offense was committed at the place where the suspect is found, but whether some reason exists not to obtain prior judicial approval for the arrest. A certain level of exigency usually accompanies the bringing together of a suspect, criminal evidence (which may be evanescent), and probable cause in the place where the offense occurred.

Gerald S. Reamey, *Arrests in Texas's "Suspicious Places": A Rule in Search of*

*Reason*, 31 TEX. TECH L. REV. 931, 976-77 (2000) (footnotes omitted).

Though somewhat tedious, it is essential to unravel the illogical thread underlying Judge Cochran's and Professor Reamey's proposal for global exigency in Article 14.03(a)(1). Judge Cochran's rationale requires a two-prong response because she did not fully distinguish two complaints. On the one hand, she questioned the exigency (preventing future crime) clause of Article 14.03(a)(1) as applied to formal arrests, versus investigative detentions. But whether that clause jives with constitutional standards is not part of the issue in controversy in this case.[18] Regardless, her position overlooks the fact that constitutional principles may independently apply when a statute is invoked. *See, e.g., State v. Villareal*, 475 S.W.3d 784, 793-814 (Tex. Crim. App. 2014) (the mandatory blood-draw statute is not a constitutional alternative to the Fourth Amendment but can be applied lawfully in conjunction with Fourth Amendment search warrant requirements or exceptions).

On the other hand, Judge Cochran criticized Article 14.03(a)(1)'s historical

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[18] It may very well be the case that an arrest (as opposed to an investigative detention) for a person "about to commit" an offense that does not rise to the level of attempt (or some other prepatory offense) would be constitutionally unlawful. *But see Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) ("'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person . . . in believing, in the circumstances shown, that the suspect has committed, is committing, or *is about to commit an offense*.") (emphasis added).

misuse to arrest or detain persons on less than probable cause or reasonable suspicion. *Id*. How an exigency requirement fixes this is unclear; exigent circumstances cannot cure the lack of probable cause or reasonable suspicion about the commission of an offense.

With Professor Reamey, it is apparent that his view is founded on his disagreement with this Court's construction of the Texas Constitution. He believed *Hulit v. State*, in which this Court held that the Texas Constitution has no warrant requirement,[19] was wrongly decided because, before *Hulit*, Texas common law and the Legislature, by creating the statutory exceptions, recognized a warrant requirement. Reamey, 31 TEX. TECH L. REV. at 976-77. In his view, Article 14 arrest provisions in general were created to operate as exceptions. To accept Professor Reamey's proposal would therefore require this Court of overturn *Hulit*. But *Hulit*'s viability twenty-one years later is not subject to debate at this time, nor has it created absurd results. Therefore, Professor Reamey's opinion can be discounted. So as it stands, there can be no need for exceptions unless there is a primary rule from which to except specific circumstances. Because Article 14.03(a)(1) is not an exception, there is no need for an overarching exigency requirement.

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[19] 982 S.W.2d 431, 436 (Tex. Crim. App. 1998).

### B. Necessity is not the mother of the invention for a global exigency requirement in Article 14.03(a)(1).

Any attempt to insert a general exigency requirement into Article 14.03(a)(1) for a public arrest cannot be rationalized as a means to ensure that it operates within constitutional limits. The Supreme Court has held that exigency is not part of the equation when justifying a warrantless arrest made in public under the Fourth Amendment. "[T]he judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like." *U.S. v. Watson*, 423 U.S. 411, 423-24 (1976); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). And, as previously mentioned, this Court in *Hulit* held that the Texas Constitution has no warrant requirement. 982 S.W.2d at 436.

Texans, it should be emphasized, can rest assured that this on-the-scene discretionary police power to arrest is not limitless. Police discretion is tempered by the duty of a magistrate to assess probable cause within forty-eight hours to decide

the validity of continued detention. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975); TEX. CODE CRIM. PROC. art. 14.06(a); *Sorto v. State*, 173 S.W.3d 469, 486 (Tex. Crim. App. 2005) (in practice, Article 14.06(a) and TEX. CODE CRIM. PROC. art. 15.17 are similar to the Supreme Court's probable-cause rule).

Additionally, the home still retains its prestige status as a castle. A warrantless arrest inside a home (or other place with a like level of privacy expectation)[20] must be supported by exigent circumstances or consent under the federal constitution and Texas statute. *Payton v. New York*, 445 U.S. 573, 590 (1980) (exigent circumstances are required for an in-home arrest); TEX. CODE CRIM. PROC. art. 14.05(2) (exigent circumstances for an in-home arrest).[21]

### C. *Gallups* and *Swain* should not be read as holding that Article 14.03(a)(1) requires exigency.

*Gallups* and *Swain* did not hold that Article 14.03(a)(1) has a general exigency requirement. *Gallups* addressed a warrantless arrest conducted inside the home, not in public. 151 S.W.3d at 197, 200-02. According to the Court, both Articles 14.03(a)(1) and 14.05(a)(1) were implicated. *Id*. at 201-02. The officers were given

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[20] *See, e.g., Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990) (overnight houseguest has an expectation of privacy).

consent to enter the home, satisfying Article 14.05(a)(1), and the home was deemed a suspicious place under Article 14.03(a)(1). *Id*. at 200-02. The Court explained that both provisions' application to a warrantless arrest in a home were consistent with state and federal constitutional heightened privacy protections because exigent circumstances justified dispensing with a warrant. *Id*. at 201-02.

*Gallups* did not create a generally applicable Article 14.03(a)(1) exigency rule; it was a combination of statutory and constitutional law that made the arrest lawful.

*Swain* also did not hold that exigency is always required under Article 14.03(a)(1). When reviewing the trial court's ruling denying Swain's motion to suppress based on his alleged warrantless arrest, this Court held that Swain had not been under arrest when he incriminated himself when talking with the police at his workplace. 181 S.W.3d at 366. Nevertheless, the Court added (as it often does in death penalty cases) that, even assuming he had been arrested, it was authorized by Article 14.03(a)(1) because he was in a suspicious place and there was probable cause and exigent circumstances. *Id*. at 366-67. In support, the Court cited *Gallups* and noted *Gallups*' reliance on Judge Cochran's *Dyar* concurrence. *Id*. at 366.

A close review of *Swain* establishes that its exigent circumstances reference is irrelevant for two reasons. First, it is most certainly *dicta*. And *dicta* "is surely the

slenderest of reeds . . . to cling to."[22] Second, it is a restatement of law from *Gallups* that overlooked the distinguishing and determinative fact that *Gallups* involved a home arrest. The factual inapplicability of a legal principle in a case is an equally slender reed.

**3. Case closed: Article 14.03(a)(1) has no global exigency requirement.**

As demonstrated, Article 14.03(a)(1)'s text does not include an exigency element for a warrantless arrest. Further, applying the literal text does not result in any absurdity. A public arrest supported by probable cause is constitutional. And Article 14.03(a)(1) can be applied to an arrest in a home (or other place with a recognizable expectation of privacy) without offending the federal constitution (and Article 14.05(2)) if exigent circumstances justify dispensing with a warrant. But that does not mean that the statute itself has to include a global exigency requirement.

Adding exigency to the statute may actually promote absurdity. If it is known that a suspect has committed a crime according to subsection(a)(1), requiring law enforcement to release a suspect (sans exigent facts) may give the suspect an opportunity to flee or destroy evidence. Even when there may be no indication of flight or evidence destruction when probable cause first developed, it is unreasonable

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[22] *Brown v. State*, 657 S.W.2d 797, 800 (Tex. Crim. App. 1983) (Clinton, J., concurring).

to proceed as if there is no real possibility of such advancements following a suspect's release. *See Atwater*, 532 U.S. at 351 (an officer could be uncertain about flight risk at the time the offense was committed but, if not arrested, the suspect may leave the jurisdiction). And, at the very least, law enforcement will be required to expend additional resources to effectuate an arrest with a warrant later. There is no doubt that it will take time and energy to locate a suspect—negotiating who, how, when, and where to effectuate an arrest. The safety risk associated with arrests to officers and other citizens must be taken into account.[23] The doubling of that risk is eliminated by an immediate arrest. These increased dangers outweigh any interest served by requiring a warrant in the absence of known exigent circumstances.

Finally, the principles underlying *stare decisis* are not disturbed because this Court is not being asked to renunciate binding authority (*e.g., Gallups* and *Swain*).

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[23] *See U.S. v. Robinson*, 414 U.S. 218, 234 (1973) (search incident to arrest justified based, in part, on officer safety; "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest."); *Maryland v. Buie*, 494 U.S. 325, 335 (1990) (officer safety justifies protective sweep during in-home arrest); *Scott v. Harris*, 550 U.S. 372, 385-86 (2007) (officer's attempt to terminate a dangerous high-speed car chase resulting from an attempted traffic stop that threatened "the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.").

## III. If Article 14.03(a)(1) has a general exigency requirement, it was satisfied here.

Under Judge Cochran's proposed exigency analysis, three factors are relevant. *Dyar*, 125 S.W.3d at 471 (Cochran, J., concurring). First, whether the suspect will remain at the location. *Id*. Second, whether evidence of the offense will disappear. *Id*. Third, whether the suspect is a continuing threat to others. *Id*. Other factors in this context include: (1) the established procedures to get a warrant; (2) the availability of a judge; and, (3) the practical problems related to getting a warrant in relation to the need to preserve reliable evidence. *Weems v. State*, 493 S.W.3d 574, 580 (Tex. Crim. App. 2016).

The court of appeals majority held exigency was not satisfied because: (1) Appellee would not be in danger of subsequent intoxicated driving; (2) the possibility of flight was ambiguous; (3) the police could have seized the truck to avoid the destruction of evidence; and, (4) the need to expeditiously draw blood has been precluded by *McNeely*. *McGuire*, 2019 WL 4065459, at *5-9. Regarding the fourth rationale, the court stated: "If dissipating blood-alcohol levels are not considered a per se exigency in the search context, they are not considered per se exigency to justify a warrantless arrest[.]" *Id*. at *9.

**1. Ability to obtain a warrant.**

Tomlin testified that the procedure to obtain a warrant was to contact a twenty-four-hour on-call assistant district attorney.[24] 5 RR 131; 10 RR 70-71. The on-call prosecutor would guide the warrant process, including contacting a judge to sign it. 5 RR 133-38. Acknowledging that there are about twenty judges in the county, he stated that, assuming he could find a judge, he could get a warrant signed anytime, but he did not specify the length of time needed. 5 RR 137-38. The summer before the accident, Tomlin explained, a prosecutor was unable to find a judge to sign a blood-draw warrant. 5 RR 132-37. Tomlin did not get an arrest warrant for Appellee because Filmore was the lead investigator and Wiles placed Appellee under arrest. 2 Supp. RR 73.

Wiles indicated that he was aware of the procedures to get a warrant and could have taken the time to get an arrest warrant, though, at the time, he believed he did not need one. 2 Supp. RR 112, 131.

Filmore admitted he did not obtain a warrant even though he knew the steps to get one. 2 Supp. RR 164-65.

Sheriff Deputy Craig Brady, who Appellee had first called from the Shell

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[24] A fax warrant-procedure was used on no-refusal weekends. 5 RR 136.

station, also testified about the on-call prosecutor protocol. 10 RR 71-73. To get a warrant signed in August 2010, he took it to one of the county's fifteen magistrates. 10 RR 71. In his thirty-plus years' experience, he never had trouble getting one in the middle of the night. 10 RR 72, 89. In response to defense counsel's inquiry about whether a warrant could have been obtained in ninety-three minutes, he stated: "it's not impossible. Drafting the affidavit is the most time-consuming aspect of it. But it could certainly be done. That's not unrealistic, especially for – – I mean, if you just stick to the probable cause affidavit." 10 RR 71-73.

Even though there was an established procedure to get a warrant, it is unknown how long it generally took in August 2010 with now decades-old technology. The only firm time frame is ninety-three minutes. That would have added an hour-and-a-half to the twenty minutes[25] that already elapsed between the accident and the accumulation of facts establishing probable cause for Appellee's arrest. So even if they could have obtained a warrant, in this case exigency should not be resolved on this single factor. The facts discussed below show exigent circumstances.

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[25] Dispatch to the accident was at 12:41 a.m., and Appellee was arrested at 1:25 a.m. 2 Supp. RR 53-54; 4 Supp. RR 116-17; 6 RR 73 (Filmore arrived at 1:10 a.m.); State's Suppression Ex. 1 (Wiles' in car video showing 1:25). But more time must had passed since Appellee traveled to the gas station and then made a few phone calls before law enforcement was dispatched. *McGuire*, 2019 WL 4065459, at *1.

**2. Evidence of BAC may have been lost or deemed inaccurate.**

Evidence of Appellee's BAC would have walked away with Appellee. *Cf. Bailey v. U.S.*, 568 U.S. 186, 198 (2013) ("Allowing officers to secure the scene by detaining those present also prevents the search from being impeded by occupants leaving with the evidence being sought or the means to find it."). His person, and therefore custody, cannot be separated from the evidence. First, had Appellee not been arrested, he could have compromised the integrity of any BAC evidence by ingesting more alcohol (which was readily available in his truck)[26] or another faculty-altering substance. *See Crider v. State*, 352 S.W.3d 704, 708 (Tex. Crim. App. 2011) ("Assuming that a suspect did not drink after being stopped by an officer, at least 'some' evidence of alcoholic 'intoxication' (defined as 0.08 BAC) should still be in his blood system four hours later . . . ."). This would completely compromise the reliability (and possibly admissibility) of any sample obtained in the future. And even if Appellee did not ingest another faculty-altering substance, the integrity of any test result could be undermined by merely suggesting that he had done so or had the opportunity to do so.

Further, the accuracy of Appellee's BAC at the time the analysis is performed

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[26] While photographing the inside of Appellee's truck, Tomlin discovered a cooler with beer. 2 Supp. RR 29-30, 69, 71.

is important. In addition to the .08 threshold, the law allows for enhancement to a Class A misdemeanor for DWI if the defendant's BAC was .15 *at the time the analysis was performed*. TEX. PENAL CODE § 49.04(d) (emphasis added). On notice of this time-specific enhancement option and that Appellee could possibly only be charged with or convicted of DWI, the troopers acted reasonably to preserve their ability to obtain a sample that may yield a .15 or more BAC. At least twenty minutes had passed between the accident and Appellee's arrest, so dissipation could have been anywhere from .003 to .0083 percent.[27] *See McNeely*, 569 U.S. at 156 (plurality) ("longer intervals may raise questions about the accuracy of the [BAC] calculation"), 165 (Roberts, C.J., concurring) (metabolization and loss of evidence must be considered in assessing exigency). The at least .0083 reduction in BAC provided an objective fact that preservation of a BAC of .15 presented a now-or-never situation. *Id.* at 152-54. The twenty minutes could have already reduced Appellee's BAC to .14 (under the .15 enhancement threshold). And two hours could have reduced it under the legal threshold.[28]

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[27] "Alcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour." *McNeely*, 569 U.S. 141, 169 (2013) (Roberts, C.J., concurring in part).

[28] If Appellee's BAC at the time of the offense was .08, the decrease in twenty minutes would have been from .077 to .071.

The scientific ability to obtain an accurate BAC through retrograde extrapolation is not a foregone conclusion. As this Court recognized in *Mata v. State*, the reliability of retrograde extrapolation depends on a variety of factors: (1) length of time between the offense and test; (2) number of tests and length of time between them; and, (3) individual characteristics of the defendant. 46 S.W.3d 902, 916 (Tex. Crim. App. 2001). The third factor includes a litany of information personal to the suspect that may be difficult or impossible for the State to obtain.[29] How these factors relate in each case will determine whether the science can be reliably applied.[30] And expecting officers working a fatality crash to weigh the

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[29] *E.g.*, "weight and gender, the person's typical drinking pattern and tolerance for alcohol, how much the person had to drink on the day or night in question, what the person drank, the duration of the drinking spree, the time of the last drink, and how much and what the person had to eat either before, during, or after the drinking." *Id*.

[30] If the State had more than one test, each test a reasonable length of time apart, and the first test were conducted within a reasonable time from the time of the offense, then an expert could potentially create a reliable estimate of the defendant's BAC with limited knowledge of personal characteristics and behaviors. In contrast, a single test conducted some time after the offense could result in a reliable extrapolation only if the expert had knowledge of many personal characteristics and behaviors of the defendant. Somewhere in the middle might fall a case in which there was a single test a reasonable length of time from the driving, and two or three personal characteristics of the defendant were known to the expert. We cannot and

known and unknown information (and to do so prospectively past their immediate investigation) to predict its application is unreasonable.

All of the aforementioned issues may defeat or implicate the accuracy of the BAC test result (even if it may not always rule out its admissibility)[31] and therefore may unfairly compromise the State's ability to meet its burden of proof. *Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010) ("a BAC-test result, by itself, is not sufficient to prove intoxication at the time of driving. There must be other evidence in the record that would support an inference that the defendant was intoxicated at the time of driving as well as at the time of taking the test."); TEX. PENAL CODE § 49.04(d) (.15 enhancement). Indeed, because the elimination rate includes a "predictable" *window of time* (.01-.0025 an hour per), an exact number (.08 and .15), which is a requirement, may never be obtainable. These BAC-test-result-related factors weigh heavily in favor of finding exigent circumstances.

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> should not determine today the exact blueprint for reliability in every case. Suffice it to say that the factors must be balanced.

*Id*. at 916-17.

[31] *State v. Mechler*, 153 S.W.3d 435, 437-41 (Tex. Crim. App. 2005) (BAC test results are admissible even without retrograde extrapolation testimony because it is relevant to intoxication and its probative value is not outweighed by the risk of unfair prejudice).

### 3. An arrest is a lesser intrusion than a blood draw, and the arrest involved a serious offense.

Even though *McNeely* rejected a *per se* rule to justify a warrantless needle intrusion into the body even after considering the BAC level of proof requirement, the exigency analysis here concerns an arrest. In contrast to exigency for the more intrusive blood draw, exigency for an arrest to prevent the loss of evidence *via* natural metabolism and possibly at the hands of Appellee did not infringe on any constitutional rights. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2183 (2016) (blood draw impinges on far more sensitive interests than searches authorized incident to arrest). Finally, the absence of a constitutional violation should be evaluated alongside the State's significant interest in prosecuting Appellee for the serious second-degree felony offense of intoxication manslaughter.[32] *Compare with Welsh v. Wisconsin*, 466 U.S. 740, 754-55 (1984) (dissipation of BAC not enough to justify exigency for warrantless entry into a suspect's home to arrest for a civil traffic offense).

### 4. This was not a run-of-the-mill DWI.

Recently a plurality of the Supreme Court observed that in *Schmerber v.*

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[32] TEX. PENAL CODE § 49.08(b).

*California*[33] the extra factor that supplied exigency in addition to dissipation was the fact of a car accident. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2537 (2019) (plurality). Such is the case here. There are multiple real-life circumstances the troopers confronted that should not be harshly condemned retroactively.

DPS had jurisdiction over the investigation, so only three state troopers were authorized to participate in the immediate investigation. 2 Supp. RR 15, 102, 135-37 (DPS works major accidents in Fort Bend county); 4 RR 114, 119, 122, 124-25 (sheriff limited to directing traffic and securing the scene, while DPS was in charge of the investigation). Trooper Filmore was the lead investigator, while Tomlin and Wiles could assist. 2 Supp. RR 84-86. This was policy at the time of accident, and the judiciary should not second-guess the resource- or expertise-based delegation of duties within law enforcement. *See Cole v. State*, 490 S.W.3d 918, 926 (Tex. Crim. App. 2016) (in assessing exigency, courts should refrain from questioning "local law-enforcement personnel management decisions and public policing strategy."). So, even though several local officers were directing traffic and preserving the accident scene, 2 Supp. RR 16, 88; 4 RR 100-01, only Tomlin and Wiles could initiate the investigation, and their authority was limited and dependent on Filmore's

[33] 384 U.S. 757 (1966).

awaited arrival and assignment of tasks. 2 Supp. RR 85-86.

The investigation involving the fatality was on-going and continuous and involved a lengthy crime-scene on a dark roadway. *See* State's Supp. Exhibit 2 (Wiles' in-car video). The troopers were actively investigating for approximately twenty minutes before Appellee's arrest. 2 Supp. RR 53-54; 4 RR 116-17; 8 RR 47; 14 RR State's Exhibit 87; State's Suppression Ex. 1 (Wiles' in-car video). The dispatcher indicated that the accident was fatal. 2 Supp. RR 17; 7 RR 112. Tomlin and Wiles, who arrived before Filmore, 5 RR 75, 80, needed to conduct a preliminary investigation to determine the basic facts, including Appellee's involvement. 5 RR 76; 8 RR 41. While waiting for Filmore to take over the investigation, 5 RR 83, Tomlin and Wiles talked to Appellee and his wife at the Shell station. 5 RR 76-80; 7 RR 113-118. Soon after, all of them proceeded to the accident scene. 5 RR 82, 156; 7 RR 119. Wiles showed Appellee Stidman's damaged motorcycle, and Appellee began crying and apologizing. 8 RR 49.

Filmore arrived less than thirty minutes after they returned to the scene. 2 Supp. RR 28. Tomlin updated Filmore on what he knew. 2 Supp. RR 140; 5 RR 89. Filmore talked to the paramedics, confirmed that Stidman was dead and looked at his body, and ordered the paramedics to obtain a blood sample from Stidman. 2 Supp. RR 142-43. Tomlin took photos of the scene, Stidman, and the vehicles, identified

the point of impact and relevant evidence, searched Appellee's truck, and painted the scene. 2 Supp. RR 29, 32, 36, 70; 5 RR 84-92, 109-18, 121-24, 161-62. While Appellee was seated in his patrol car, Wiles helped by painting the scene and continued to assist with the investigation for a half hour before Appellee was taken to the hospital. 2 Supp. RR 147-48, 154; 7 RR 138; 6 RR 34; State's Suppression Ex. 1 (Wiles' in-car video). Tomlin and Wiles remained at the scene to investigate. 2 Supp. RR 102. After Filmore took Appellee to the hospital and before he took him to the jail Filmore was directing the investigation of the scene over the phone. State's Suppression Ex. 2 (Filmore's in-car video). He returned to the crime scene and continued his investigative duties, which involved notifying Stidman's family and obtaining any relevant video recordings from nearby businesses. 6 RR 63-64. In all, they were at the scene for a few hours. 5 RR 124.

The objective facts show that the troopers could "reasonably have believed that [they were] confronted with an emergency" when arresting Appellee without a warrant after have already engaged in a demanding twenty-minute investigation and knowing there was more to come. *See Schmerber*, 384 U.S. at 770; *Mitchell*, 139 S. Ct. at 2538 (plurality) (fatalities, preservation of evidence at the scene, blocking or redirecting traffic to prevent further accidents are "pressing matters" that "would require responsible officers to put off applying for a warrant, and that would only

exacerbate the delay—and imprecision—of any subsequent BAC test."); *Cole*, 490 S.W.3d at 925-26 ("law enforcement was confronted with not only the natural destruction of evidence through natural dissipation of intoxicating substances, but also with the logistical and practical constraints posed by a severe accident involving a death and the attendant duties this accident demanded.").

**5. Location in relation to flight.**

The lower court considered Appellee's location and flight in the wrong light. *McGuire*, 2019 WL 4065459, at *5-9. There is no ambiguity about whether Appellee would have remained at the scene beyond the time needed for the troopers to conclude their investigatory detention. *See Illinois v. McArthur*, 531 U.S. 326, 331-33 (2001) (temporary detention to prevent reentry into home justified by probable cause to believe the home contained drugs and approximately two-hour time period required to get a search warrant). Appellee would not have remained there for any certain or indefinite time. He was on the side of a highway in the middle of the night. Had he been free to leave, he could have left. And if he had no legal obligation to stay and the officers were willing to release Appellee's truck to his mother, it's safe to assume he would have left. So to say that evidence of flight (in the traditional sense) was ambiguous misses the point. Had Appellee not been arrested after the time troopers reasonably had to confirm or dispel their suspicions, his departure

would not necessarily constitute flight. *U.S. v. Sharpe*, 470 U.S. 675, 686 (1985) ("In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."). The cart-before-the-horse perspective of the lower court would obligate police to rely on the goodwill of a suspect to stay in the presence of police when there is no duty to do so. This is unrealistic and absurd, which is exactly why it is constitutional to arrest a person in public based on probable cause that a crime was committed. *See Gerstein*, 420 U.S. at 113 (warrant "would constitute an intolerable handicap for legitimate law enforcement.").

Finally, as discussed above, to allow Appellee to leave while officers obtained an arrest warrant would cause unnecessary delay and use of law-enforcement resources (in addition to allowing for the loss or destruction of evidence). Given that his travel would not have been restricted, it would be unknown how long it would take police to find Appellee again to execute the warrant. Importantly, it would present another opportunity to risk the safety of officers and bystanders.

## PRAYER FOR RELIEF

The court of appeals' decision should be reversed and the case remanded for trial.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 6,433, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

*/s/ Stacey M. Soule*
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## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Brief has been served on January 10, 2020, via email or certified electronic service provider to:

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